

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES L. BIBBS,)
)
Plaintiff,) CASE NO. C08-1620-TSZ
)
v.)
) REPORT AND RECOMMENDATION
TUKWILA POLICE DEPARTMENT, *et al.*,)
)
Defendants.)
_____)

INTRODUCTION AND SUMMARY CONCLUSION

This is a civil rights action brought under 42 U.S.C. § 1983. Plaintiff alleges in this action that three members of the Tukwila Police Department, Officers Brian Jordan and Mike Richardson, and Sergeant Steven Gurr, violated his federal constitutional rights during the course of an arrest in January 2007. Plaintiff seeks damages, attorney's fees and costs. Defendants now move for summary judgment. Plaintiff opposes defendants' motion. This Court, having reviewed defendants' motion, plaintiff's response thereto, and the balance of the record, concludes that defendants' motion for summary judgment should be granted and that plaintiff's amended complaint, and this action, should be dismissed with prejudice.

01 FACTUAL/PROCEDURAL BACKGROUND

02 On January 14, 2007, plaintiff was arrested by Tukwila Police Officers after shoplifting
03 merchandise from the Nordstrom Department Store at Southcenter Mall and attempting to
04 evade loss prevention personnel. (*See* Dkt. No. 32 at 3; Dkt. No. 60, Exs. 1-4.) The incident
05 began when Nordstrom loss prevention personnel observed plaintiff enter the lingerie
06 department, remove three women's tops from their hangers, and place them under his jacket.
07 (Dkt. No. 60, Ex. 1.) After exiting the store without having paid for the concealed
08 merchandise, plaintiff was confronted by loss prevention personnel and was asked to return
09 inside the store. (*Id.*) At that point, plaintiff began to run in the direction of a nearby
10 restaurant with loss prevention officers in pursuit. (*Id.*)

11 Loss prevention officers lost sight of plaintiff as he ran behind the restaurant. (*Id.*)
12 After officers searched the parking lot and failed to locate plaintiff, one of the officers
13 approached the front entrance of the restaurant intending to look for him inside. (*Id.*) As the
14 officer approached the entrance, plaintiff was stepping out of the restaurant and he began to run
15 again when the officer attempted to make contact with him. (*Id.*) Plaintiff ran north across
16 Southcenter Parkway with loss prevention officers again in pursuit. (*Id.*)

17 During the pursuit, one of the loss prevention officers contacted the Tukwila Police.
18 (*Id.*) Officer Brian Jordan responded to the scene and was driving down Southcenter Parkway
19 when he saw plaintiff run across the street. (*Id.*, Ex. 2.) Officer Jordan stopped his vehicle
20 and confirmed with the loss prevention officers, who were still in pursuit, that the individual he
21 had seen was the shoplifting suspect. (*Id.*) Officer Jordan then followed plaintiff into a large
22 gully where he found plaintiff knee deep in water near a drainage pipe. (*Id.*) Officer Jordan

01 drew his gun, pointed it at plaintiff, and ordered him to climb up out of the ditch. (*See* Dkt. No.
02 32 at 3; Dkt. No. 60, Ex. 1.) Plaintiff climbed up an icy slope towards Officer Jordan, slipping
03 a couple of times along the way. (*See id.*)

04 The foregoing facts are largely agreed upon by the parties. The dispute in this action
05 concerns what happened once plaintiff reached to the top of the slope. According to the
06 allegations in the amended complaint, after plaintiff climbed up the slope on his own, Officer
07 Jordan grabbed him and pulled him ten feet through snow and ice causing plaintiff's head to hit
08 a rock. (Dkt. No. 32 at 3.) Officer Jordan then kneed plaintiff several times in the back as
09 plaintiff lay on the ground, with his hands behind him, attempting to surrender. (*Id.* at 3-4.)
10 Plaintiff claims that he was beginning to lose consciousness when Officer Richardson came
11 over, pushed his face into the snow, and kneed plaintiff several more times in his back and ribs.
12 (*Id.* at 4.) According to the amended complaint, Officer Richardson then kicked plaintiff
13 several more times after he was handcuffed. (*Id.*)

14 The police officers thereafter hoisted plaintiff up and Officer Jordan walked him
15 towards a supervisor's patrol car. (*Id.*) Plaintiff asked the supervisor, Sergeant Gurr, why he
16 had allowed the officers to hurt him. (*Id.*) Sergeant Gurr allegedly replied "shut-up nigger,
17 stay in your place" and "[t]hey should have done more to your dumb ass." (*Id.*) Sergeant
18 Gurr then laughed and instructed Officer Jordan to place plaintiff in the patrol car. (*Id.*)
19 Officer Jordan shoved plaintiff into the car and pushed him down into the backseat causing
20 plaintiff to hit his head on the door frame. (*Id.*)

21 Defendants' version of events is set forth in reports written by Officers Jordan and
22 Richardson following the incident on January 14, 2007, which were submitted in support of

01 defendants' summary judgment motion. (*See* Dkt. No. 60, Exs. 2 and 3.) According to
02 Officer Jordan's report, once plaintiff climbed out of the ditch, he immediately grabbed
03 plaintiff and pulled him to the ground into a prone position. (*Id.*, Ex. 2.) Plaintiff initially had
04 his hands under his body and Officer Jordan yelled at him to put his hands behind his back, but
05 plaintiff did not immediately comply. (*Id.*) Officer Richardson then arrived on the scene to
06 assist. (*Id.*) Officer Jordan performed an arm bar maneuver and managed to get plaintiff's
07 right arm behind his back. (*Id.*) Plaintiff then quickly put his left arm behind his back and
08 Officer Jordan handcuffed him without incident. (*Id.*)

09 According to Officer Richardson's report, when he arrived at Officer Jordan's location,
10 he saw Officer Jordan struggling with plaintiff on the ground and he heard Officer Jordan direct
11 plaintiff to put his hands behind his back, but plaintiff was non-compliant. (*Id.*, Ex. 3.)
12 Plaintiff resisted Officer Jordan's efforts to handcuff him by first tucking his arms in and then
13 straightening them out to the side and tensing them thereby making it difficult to get plaintiff's
14 hands behind his back. (*Id.*) Officer Richardson assisted Officer Jordan by delivering one
15 elbow strike to the right side of plaintiff's body followed by one knee strike to the left side of
16 plaintiff's body. (*Id.*) Plaintiff then immediately complied by putting his hands behind his
17 back and he was handcuffed without further incident. (*Id.*)

18 According to Sergeant Gurr, who submitted a declaration in support of defendants'
19 summary judgment motion, he responded as a supervisor to the call involving the shoplifting
20 incident because the suspect had fled on foot and was attempting to elude officers. (Dkt. No.
21 59 at 1.) By the time Sergeant Gurr arrived on the scene, plaintiff was already in handcuffs and
22 Officer Jordan was leading him to the patrol car. (Dkt. No. 59 at 2.) Plaintiff was thereafter

01 placed in the patrol car and transported to the police station for booking. (*Id.*)

02 Officer Jordan's report states that plaintiff began to complain of pain in his right
03 shoulder while at the station and that plaintiff explained he had hurt his shoulder while climbing
04 out of the ditch. (Dkt. No. 60, Ex. 2.) The Tukwila Fire Department responded to the police
05 station, evaluated plaintiff, and determined that he needed to be transported to the hospital for
06 further evaluation. (*See id.*) Plaintiff was issued a citation for the shoplifting offense,
07 released from police custody, and transported to the Valley Medical Center via Tri-Med
08 Ambulance for further evaluation of his shoulder injury. (*See id.*; Dkt. No. 28, Ex. B.)

09 Once at the hospital, plaintiff was evaluated by emergency room personnel and x-rays
10 were taken of plaintiff's right shoulder and right heel. (*See* Dkt. No. 28, Ex. 2. *See also*, Dkt.
11 No. 62, Attachment at 4-12.) Plaintiff was diagnosed with a strained right shoulder, foot pain,
12 and an abrasion to his right arm, and he was given a prescription for Vicodin. (*See id.*)

13 On November 5, 2008, plaintiff submitted his original civil rights complaint to this
14 Court for filing. (*See* Dkt. No. 1.) Plaintiff alleged therein violations of state and federal law
15 arising out of his January 2007 arrest, and he identified the Tukwila Police Department, Officer
16 Jordan, Police Chief David Haynes, Officer John Doe I, and Supervisor John Doe II as
17 defendants. (*See* Dkt. No. 7.) Plaintiff's complaint was ordered served on the Tukwila Police
18 Department, Officer Jordan and Chief Haynes. (Dkt. Nos. 8 and 9.)

19 On February 3, 2009, defendants filed a motion to dismiss a majority of plaintiff's
20 causes of action under Rule 12 of the Federal Rules of Civil Procedure. (Dkt. No. 17.)
21 Shortly thereafter, plaintiff submitted a proposed amended complaint. (Dkt. No. 18.) On
22 May 29, 2009, the Court, the Honorable Thomas S. Zilly, United States District Judge, granted

01 in part and denied in part defendants' motion to dismiss, and granted plaintiff leave to amend.
02 (*See* Dkt. No. 31.) The Court specifically permitted plaintiff to proceed on the Fourth, Eighth,
03 and Fourteenth Amendment claims asserted in his amended complaint against Officer Jordan,
04 Officer Richardson, and Sergeant Gurr. (*See id.*) The Court dismissed all other claims. (*Id.*)

05 On November 19, 2010, defendants filed the motion for summary judgment which is
06 currently pending before the Court, along with supporting documents. (Dkt. Nos. 57, 58, 59,
07 and 60.) Plaintiff filed a response to defendants' motion on January 26, 2011. (Dkt. No. 62.)
08 The Court accepted plaintiff's response for filing, even though it was not submitted in a timely
09 fashion, and instructed defendants to file a reply brief addressing plaintiff's arguments. (*See*
10 Dkt. No. 63.) Defendants filed their reply brief on February 18, 2011. (Dkt. No. 64.) The
11 briefing in this matter is now complete and defendants' motion for summary judgment is ripe
12 for review.

13 DISCUSSION

14 Summary Judgment Standard

15 Summary judgment is proper only where "the pleadings, depositions, answers to
16 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
17 genuine issue as to any material fact and that the moving party is entitled to judgment as a
18 matter of law." Fed.R.Civ.P. 56(c). The moving party has the burden of demonstrating the
19 absence of a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
20 242, 257 (1986). Genuine disputes are those for which the evidence is such that a "reasonable
21 jury could return a verdict for the nonmoving party." *Id.* Material facts are those which might
22 affect the outcome of the suit under governing law. *Id.*

01 In response to a properly supported summary judgment motion, the nonmoving party
02 may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts
03 demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the
04 existence of the elements essential to his case. *See* Fed. R. Civ. P. 56(e). A mere scintilla of
05 evidence is insufficient to create a factual dispute. *See Anderson*, 477 U.S. at 252. In ruling
06 on a motion for summary judgment, the court is required to draw all inferences in a light most
07 favorable to the non-moving party. *Id.* at 248. The court may not weigh the evidence or make
08 credibility determinations. *Id.*

09 Section 1983 Standard

10 In order to sustain a cause of action under 42 U.S.C. §1983, a plaintiff must show (i) that
11 he suffered a violation of rights protected by the Constitution or created by federal statute, and
12 (ii) that the violation was proximately caused by a person acting under color of state law. *See*
13 *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). To satisfy the second prong, plaintiff
14 must allege facts showing how individually named defendants caused or personally
15 participated in causing the harm alleged in the complaint. *See Arnold v. IBM*, 637 F.2d 1350,
16 1355 (9th Cir. 1981). The causation requirement of § 1983 is satisfied only if a plaintiff
17 demonstrates that a defendant did an affirmative act, participated in another's affirmative act, or
18 omitted to perform an act which he was legally required to do that caused the deprivation
19 complained of. *Id.* (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)).

20 Excessive Force

21 Plaintiff alleges in his amended complaint that Officers Jordan and Richardson used
22 more force than necessary to effectuate his arrest on January 14, 2007. The standard for

01 analyzing claims of excessive force was established by the Supreme Court in *Graham v.*
02 *Connor*, 490 U.S. 386 (1989). *Graham* instructs that such claims are to be evaluated under the
03 Fourth Amendment's reasonableness standard: "The question is whether the officers' actions
04 are 'objectively reasonable' in light of the facts and circumstances confronting them, without
05 regard to their underlying intent or motivation." *Id.* at 397 (citation omitted).

06 The Court cautioned that reasonableness must be assessed from the perspective of a
07 reasonable officer on the scene, rather than with the 20/20 vision of hindsight, and must allow
08 for the fact that "police officers are often forced to make split-second judgments – in
09 circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is
10 necessary in a particular situation." *Id.* at 397. The Court made clear that proper application
11 of the reasonableness standard requires careful consideration of the specific facts and
12 circumstances of each individual case, including "the severity of the crime at issue, whether the
13 suspect poses an immediate threat to the safety of the officers or others, and whether he is
14 actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

15 Defendants do not analyze plaintiff's excessive force claim in light of the above
16 standard nor do they even cite to the applicable standard in their motion papers. Defendants
17 instead offer a series of arguments which are of little assistance to the Court in determining
18 whether they are entitled to judgment as a matter of law in this action. For example,
19 defendants argue in their motion that plaintiff has presented no evidence to support or
20 corroborate his claims. However, up until the time defendants filed their summary judgment
21 motion, plaintiff was under no obligation to present any such evidence. Defendants also argue
22 that plaintiff's claims are "inherently implausible" and his testimony is "patently unbelievable"

01 while acknowledging, as they must, that inferences are normally drawn in favor of the
02 non-moving party on summary judgment and that credibility determinations are normally
03 reserved for the jury.¹ Finally, defendants argue that plaintiff's claims of permanent injury are
04 demonstrably false in light of subsequent arrests for stealing merchandise from another local
05 business and for assaulting his girlfriend. Defendants fail to make clear, however, how
06 plaintiff's subsequent arrests are in any way relevant to plaintiff's excessive force claims
07 against Officers Jordan and Richardson.

08 Despite the deficiencies in defendants' briefing, plaintiff addresses the relevant issues in
09 his briefing and there appear to be sufficient materials in the record for the Court to evaluate
10 plaintiff's excessive force claim in light of the applicable standard. The first step in evaluating
11 a claim of excessive force is to assess the amount of force used by the officers. *See Davis v.*
12 *City of Las Vegas*, 478 F.3d 1048, 1055 (9th Cir. 2007). There can be no question that some
13 force was used to effectuate plaintiff's arrest. Defendants have submitted in support of their
14 summary judgment motion a Use of Force Report which was completed by Officer Richardson

15
16 ¹ Defendants assert that "the Court is not required to accept or assume the truth of
17 testimony that is 'patently unbelievable or untrustworthy,' or require a jury to hear claims that
18 are 'inherently implausible.'" (Dkt. No. 57 at 2.) Defendants cite to four Ninth Circuit
19 opinions to support this assertion. The first case cited, *U.S. v. Hall*, 940 F.2d 669 (9th Cir.
20 1991), is an unpublished disposition and citation to this opinion violates Ninth Circuit Rule
21 36-3(c). Two of the three remaining cases cited by defendants, *United States v. Gillock*, 886
22 F.2d 220, 222 (9th Cir. 1989), and *United States v. Foster*, 711 F.2d 871, 877 (9th Cir. 1983),
involve direct appeals of federal criminal convictions where sufficiency of the evidence claims
were asserted. In both cases, the Ninth Circuit made clear that credibility determinations are
the province of the jury. Defendants fail to make clear how those cases support their
suggestion that the Court is permitted to make credibility determinations when considering a
motion for summary judgment. The final case cited by defendants, *Bonin v. Calderon*, 59 F.3d
815 (9th Cir. 1995), is a 36 page opinion issued in a federal habeas action. Defendants provide
no pinpoint cite to direct the court to any potentially relevant portion(s) of the opinion, and this
Court was unable to discern any obvious relevance through its brief review of the head notes.

01 following plaintiff's arrest. (*See* Dkt. No. 60, Ex. 4.) That report indicates that Officer
02 Richardson delivered one knee strike and one elbow strike to the side of plaintiff's body when
03 plaintiff resisted Officer Jordan's efforts to handcuff him.² (*See id.*) The report also indicates
04 that the force was employed in response to plaintiff's eggessive (pulling away) and static
05 (isometric muscle tension) actions, and that plaintiff complained of a shoulder injury following
06 the incident. (*See id.*) Officer Jordan's report of the incident indicates that he performed an
07 arm bar maneuver in an effort to get plaintiff's arm behind his back to be cuffed. (*See id.*, Ex.
08 2.)

09 Plaintiff contends that the amount of force used was much more extensive than reported
10 by defendants and included multiple knee and elbow strikes to his ribs, chest, and back.
11 Plaintiff also contends that he twice hit his head during the encounter with officers, once on a
12 rock as Officer Jordan dragged him across the ground, and once when Officer Jordan pushed
13 him into the back seat of the patrol car. Plaintiff asserts that he lost consciousness twice as a
14 result of his head injuries, once in the patrol car and once at the station. He further asserts that
15 he has suffered ongoing medical problems as a result of the officers' actions including leg,
16 back, and neck pain as well as headaches, seizures, and unusual behaviors related to a mild
17 concussion.

18 Plaintiff's claims regarding the degree of force used by defendants is simply not
19 supported by the evidence in the record. Plaintiff has provided the Court with copies of
20 medical reports which detail his condition after his encounter with police on January 14, 2007.
21 Those reports include the ambulance record prepared by the Tri-Med Ambulance personnel

22 ² Knee and elbow strikes are considered Level 2 Tactics on the Tukwila Police
Department use of force continuum. (*See* Dkt. No. 62, Attach. at 2.)

01 who transported plaintiff from the police station to the hospital emergency room, and various
02 reports prepared by the medical staff at Valley Medical Center where plaintiff was evaluated
03 and treated on the night of his arrest. (*See* Dkt. No. 28, Ex. B; Dkt. No. 62, Attach. at 4-12.)

04 The ambulance record indicates that the ambulance was dispatched in response to a
05 complaint of shoulder pain. (Dkt. No. 28, Ex. B.) The narrative portion of the report appears
06 to indicate that plaintiff attributed the pain in his right shoulder to his fall into the ditch when he
07 was running away from the loss prevention personnel. (*Id.*) The report also indicates that
08 plaintiff was alert and oriented on examination, and that plaintiff specifically denied suffering
09 any dizziness. (*Id.*)

10 The records of plaintiff's emergency room visit indicate that plaintiff's chief complaint
11 to the medical staff at Valley Medical Center was a shoulder injury, though he also complained
12 of pain in his right heel and in his right hip. (Dkt. No. 62, Attach. at 4 and 11.) There is no
13 indication in the records of his emergency room visit that plaintiff ever complained of any
14 injuries to his head, back, neck, ribs, or chest – injuries which would have been consistent with
15 the blows plaintiff claims were inflicted by defendants and with his current complaints
16 regarding ongoing medical issues related to officers' actions in January 2007. In fact, the
17 records specifically note that plaintiff's head was "atraumatic" upon examination with no
18 apparent bruising, that his neck was non-tender with a full range of motion, that his chest was
19 non-tender, and that his neurological examination was normal. (Dkt. No. 62, Attach. at 4.)

20 While at the emergency room, x-rays were taken of plaintiff's right shoulder and right
21 heel and were found to be negative, and the doctor's report described plaintiff's injuries as
22 "minor." (*Id.*) Ultimately, plaintiff was diagnosed with a sprained shoulder, a foot contusion,

01 and an abrasion to his right arm. (*See id.* at 4, 6 and 9.)

02 In addition to the medical records from the night of the arrest, plaintiff has also provided
03 a page from a report of a medical appointment five days after his arrest. (*Id.* at 5.) That page
04 reflects that plaintiff raised a concern at the subsequent medical appointment about a right
05 shoulder strain and left rib pain related to his arrest on January 14, 2007. (*Id.*) However, the
06 document provides little support for plaintiff's excessive force claims as it contains no
07 diagnosis related to plaintiff's complaints, it reflects no complaints of any head, back or neck
08 pain or injury, and it reveals that plaintiff never filled the prescription for pain medication that
09 he had been given at the emergency room. (*Id.*)

10 Finally, plaintiff has provided a number of medical reports related to his complaints of
11 headaches, neck pain, back pain, and seizures. (*See id.* at 36-44.) However, those reports are
12 from evaluations/testing conducted in 2010, over three years after plaintiff's arrest, and plaintiff
13 offers no evidence that any of the conditions reflected in those reports is in any way related to
14 the events of January 14, 2007. (*See id.*)

15 In sum, the record establishes that while some degree of force was employed by officers
16 on the night of plaintiff's arrest, the force did not result in any significant injury to plaintiff.
17 The next question the Court must consider is whether the amount of force employed was
18 reasonable. Plaintiff claims that the officers' actions were not justifiable because he did not
19 resist arrest nor did he try to prevent officers from handcuffing him. As noted above, the
20 officers' reports of the incident reflect that plaintiff did not comply, at least initially, with
21 directives that he place his hands behind his back. While plaintiff disputes this assertion, he
22 acknowledges that he put his arms out to his sides at one point, in response to Officer Jordan's

01 directive that he get into a prone position, because he misunderstood the directive. (*See* Dkt.
02 No. 62 at 7.)

03 Whether plaintiff was trying to obstruct officers' efforts to handcuff him by placing his
04 arms out to the side, or whether he simply misunderstood Officer Jordan's directive, is not clear
05 from the record. What is clear, however, is that at the time police encountered plaintiff,
06 plaintiff had already twice fled from loss prevention officers – once when they contacted him
07 immediately outside the store, and once when they attempted to contact him outside the
08 restaurant where he was attempting to hide. The record demonstrates that the amount of force
09 employed was reasonable to gain control of an individual who had already demonstrated a
10 willingness to flee when provided an opportunity to do so. Based on the foregoing, this Court
11 concludes that defendants' motion for summary judgment should be granted with respect to
12 plaintiff's excessive force claim.

13 Failure to Intercede

14 Plaintiff appears to allege in his amended complaint that Sergeant Gurr, who was
15 present at the scene of the arrest, failed to intervene to protect plaintiff from the unlawful
16 actions of his subordinate officers. A supervisor may be held liable under § 1983 "if he or she
17 was personally involved in the constitutional deprivation or a sufficient causal connection
18 exists between the supervisor's unlawful conduct and the constitutional violation." *Lolli v.*
19 *County of Orange*, 351 F.3d 410, 418 (9th Cir. 2003) (quoting *Jackson v. City of Bellingham*,
20 268 F.3d 646, 653 (9th Cir. 2001)). The Ninth Circuit has explained that supervisors can be
21 held liable for: 1) their own culpable action or inaction in the training, supervision, or control of
22 subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is

made; or 3) for conduct that showed a reckless or callous indifference to the rights of others.”
Cunningham v. Gates, 229 F.3d 1271, 1292 (9th Cir. 2000).

Sergeant Gurr submitted a declaration in support of defendants’ motion for summary judgment in which he explains that he responded as a supervisor to the report of a theft from Southcenter Mall because the suspect had fled the scene on foot and was attempting to elude officers. (Dkt. No. 59.) Sergeant Gurr states that he subsequently learned that Officers Jordan and Richardson had apprehended the suspect, and that he arrived on the scene after the officers had already handcuffed plaintiff and Officer Jordan was leading him to the patrol car. (*Id.*) Sergeant Gurr further states that he did not participate in either the pursuit or the arrest, and that he at no time saw either officer act inappropriately towards plaintiff. (*Id.*) Plaintiff offers no evidence to the contrary. Accordingly, defendants’ motion for summary judgment should be granted with respect to plaintiff’s claims against Sergeant Gurr.

Denial of Medical Attention

Plaintiff asserts in his amended complaint that defendants denied him proper medical attention for injuries suffered during the course of his arrest. Plaintiff’s claim of inadequate medical care arises under the Due Process Clause of the Fourteenth Amendment rather than under the Eighth Amendment because plaintiff was not a convicted prisoner, but was merely in police custody, at the time of the alleged denial of medical care. *See Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996).

The Ninth Circuit has made clear that, with respect to medical needs, “the due process clause imposes, at a minimum, the same duty the Eighth Amendment imposes: ‘persons in custody ha[ve] the established right to not have officials remain deliberately indifferent to their

01 serious medical needs.”” *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002)
02 (citing *Carnell*, 74 F.3d at 979.) A medical need is deemed serious if the failure to treat the
03 condition could result in further significant injury or the “unnecessary and wanton infliction of
04 pain.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992) (citing *Estelle v. Gamble*, 429
05 U.S. 97, 104 (1976)). In order to establish deliberate indifference, a plaintiff must show a
06 purposeful act or failure to act on the part of the defendants. *McGuckin*, 974 F.2d at 1060.

07 Officer Jordan’s report of plaintiff’s arrest states that medical attention was sought for
08 plaintiff after he began complaining of shoulder pain at the police station. (Dkt. No. 60, Ex. 2.)
09 Plaintiff asserts in his response to defendants’ summary judgment motion that Officer Jordan
10 and Sergeant Gurr knew he needed treatment at the scene of the arrest and failed to provide it.
11 (See Dkt. No. 62 at 9-10.) Plaintiff suggests that the fact that he lost consciousness both in the
12 patrol car and at the station, and the fact that he could barely move his right arm, were indicative
13 of his need for immediate medical attention. (*Id.*)

14 As noted above, there is no evidence in the record that plaintiff suffered any sort of head
15 injury during the course of his arrest. With respect to the shoulder injury, there is no evidence
16 that the failure to treat that injury sooner resulted in further significant injury. And, in fact, the
17 record reflects that plaintiff received relatively prompt treatment for his shoulder injury.
18 Plaintiff was arrested at approximately 8:30 p.m. (see Dkt. No. 60, Exs. 2, 3, and 4), the fire
19 department began their evaluation of plaintiff before 9:00 p.m. (see Dkt. No. 28-2 at 11-12),
20 and plaintiff arrived at the hospital via ambulance just after 9:30 p.m. (see Dkt. No. 62-1 at 11).
21 There is simply no evidence of any significant delay in plaintiff receiving medical treatment for
22 his injuries. Accordingly, defendants are entitled to summary judgment with respect to

01 plaintiff's claim that they denied him timely medical attention.

02 CONCLUSION

03 For the reasons set forth above, this Court recommends that summary judgment be
04 granted in favor of defendants and that plaintiff's amended complaint, and this action, be
05 dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

06 DATED this 22nd day of April, 2011.

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08 Mary Alice Theiler
09 United States Magistrate Judge
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